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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re J.T., a Person Coming Under the
Juvenile Court Law.

B239641
(Los Angeles County
Super. Ct. No. CK53500)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

GLORIA T.,

Defendant and Appellant.

APPEAL from a judgment and order of the Superior Court of Los Angeles County. Anthony Trendacosta, Juvenile Court Referee. Affirmed.

Lori Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Emery El Habiby, Deputy County Counsel, for Plaintiff and Respondent.

Gloria T. (Mother) appeals orders from the dependency court denying her Welfare and Institutions Code section 388 petition¹ and terminating her parental rights. Mother disappeared from the life of her son, J.T., for more than five years, and she only attempted to establish a relationship with him long after he had come to regard his legal guardian as his mother.

The dependency court did not err in denying Mother's section 388 petition, and the termination of parental rights was proper. Accordingly, we affirm.

FACTS

Detention and guardianship

J.T. was born in September 2003. The Department of Children and Family Services (DCFS) received a referral soon after his birth alleging that Mother appeared to be disconnected from J.T. and unable to care for him. Mother had been diagnosed with a psychotic disorder. She was allowed to bring J.T. home, but she soon after contacted DCFS, stating that she was unable to care for him. When the caseworker arrived at Mother's home, she determined that J.T. should be detained, but Mother resisted, forcing the caseworker to call law enforcement. Mother then barricaded herself in her home, causing a four-hour standoff. After Mother was finally persuaded to let the caseworker reenter, J.T. was detained.

At the detention hearing, the court found that J.T. was a child described by section 300, subdivision (b) and ordered him detained from Mother. DCFS was ordered to provide family reunification services to Mother, and J.T. was placed with Mother's cousin, Annette T.

The dependency court sustained a section 300 petition in February 2004, finding that there was no reasonable means to protect J.T. without removal from Mother's physical custody. At the section 366.21, subdivision (e) hearing in May 2004, Mother was reported to be visiting J.T. inconsistently and she seemed distracted. Mother's

¹ Unless otherwise noted, all further statutory references are to the Welfare and Institutions Code.

family reunification services were terminated at the section 366.21, subdivision (f) hearing in December 2004 because she was not in compliance with her case plan. Meanwhile, J.T. was thriving in the care of Annette T. and called her “mama.”

An April 2005 section 366.26 report noted that Mother had not visited J.T. in the past six months. Annette T. had been J.T.’s caretaker since October 2003 and continued to take good care of him.

Annette T. was appointed J.T.’s legal guardian in January 2006. The dependency court found that termination of parental rights would be detrimental, however, because Annette T. was unable or unwilling to adopt J.T. because of exceptional circumstances. In February 2006, jurisdiction was terminated with directions that Kin-Gap (Kinship Guardianship Assistance Payments) funding remain in place. In May 2006, Mother filed a section 388 petition, explaining that the amount of funding was substantially reduced when jurisdiction was terminated. She requested that the dependency court reopen jurisdiction so that Annette T., as J.T.’s guardian, could receive specialized funding. The court granted Mother’s petition, and jurisdiction was reinstated.

Renewed visitation

Mother did not visit J.T. for over five years. Annette T. had provided J.T. with a nurturing home and he thought of her as his mother. Annette T. would not agree to termination of court jurisdiction, however, because she feared J.T. would lose benefits and services without court supervision.

Then, in July 2010, Mother appeared in court, requesting visitation with J.T. She was married and living in Arkansas with a new husband and four-year-old son. Mother stated that she wished to regain custody of J.T. Minor’s counsel objected to visitation, arguing that J.T. did not know Mother, and that he knew Annette T. as his mother. The court denied Mother’s visitation request and scheduled a section 366.26 hearing, and it further ordered that nobody discuss with J.T. who his biological mother was.

Mother was allowed to visit J.T. twice in the following months. During one visit she violated the court’s order by giving J.T. a photo of herself and her younger child, on which she had written “your mother and brother.”

In November 2010, a hearing was held, at which the dependency court ordered DCFS to discuss with Mother that she was not to reveal her biological relationship with J.T. The court found that Annette T. was not interested in adoption. Mother was granted monitored visits with J.T., so long as she brought no one else along.

Mother filed a section 388 petition in May 2011, challenging the court's order terminating her family reunification services and selecting legal guardianship as the permanent plan for J.T. Mother claimed her circumstances had changed because she completed a parenting class, received counseling services, and had a safe and stable home. Mother believed it would be in J.T.'s best interest to have a relationship with his younger half brother and for them to live together as a family.

From the period of February to May 2011, Mother met with J.T. in person only four times, and had telephone contact with him about once a week. J.T. continued to identify Annette T. as his mother and said, "I love my mommy. She is good to me and this is my home."

The dependency court denied Mother's section 388 petition in July 2011. The court found that while it appeared Mother had addressed her stability issues and was a good parent to her young child, the focus was on what was best for J.T. J.T. had lived with Annette T. since soon after birth, he identified her as his mother, he was thriving in her home, and he was doing very well in school. The court found that, even assuming that there had been changed circumstances, restarting reunification services was improper because it was not in J.T.'s best interest.

In September 2011, Mother's therapist submitted a letter to the court stating that Mother had completed eight individual therapy sessions and nine family therapy sessions. A psychiatric evaluation indicated no findings that she had any current mental health issues. Although her overall intellectual functioning was below average, she was able to make decisions effectively.

Mother continued to receive monitored visits with J.T. She would make weekly, 30-minute telephone calls to him, during which she would talk to J.T. for five minutes and then allow her younger son to speak the remainder of the time. On several occasions,

the caseworker attempted to terminate the call prior to the end of the 30-minute period, but Mother's husband became belligerent on the telephone and yelled at the caseworker. Mother also received monthly two-hour visits with J.T. at the DCFS office. During visits, J.T. would run around and play with Mother's younger son. Mother made minimal contact with J.T., instead spending most of her time monitoring her younger son. Mother and J.T. did not appear to bond during the visits.

Section 366.26 hearing

On January 23, 2012, the date of the scheduled section 366.26 hearing, Mother filed another section 388 petition, seeking to terminate the order of legal guardianship for J.T. and return him to her custody. She further requested family reunification services and unmonitored visits. She maintained that she was bonded with J.T., and that J.T. was bonded with his half brother. She stated that she had finished two parenting classes and was in therapy, and that she was a stable parent.

At the hearing, Mother requested a continuance to obtain a bonding study of Mother and J.T., and also of J.T. and Mother's two other children (she had recently given birth to another child). Mother stated that she wished to examine J.T., but that he was not present in court. She also wanted to cross-examine the caseworker and Annette T., but neither of them were present.

The dependency court denied Mother's continuance request, finding that Mother's section 388 petition was untimely, and even if it was timely, that it was not in J.T.'s best interest. Furthermore, a bonding study was not appropriate because it would not assist the trier of fact.

The court inquired whether J.T. was adoptable. Mother's counsel argued that Annette T. had previously stated she did not want to adopt J.T. Minor's counsel responded that although Annette T. had not originally intended to adopt, she had since become committed to adoption and had worked with the adoption social worker to complete a home study.

Mother testified at the hearing that she had completed two parenting classes, and that she continued to go to individual and family counseling. She stated that J.T. got

along and played well with his five-year-old half brother. When Mother visited with J.T. he would come to her and give her hugs, and he would not want to leave her when their visits finished.

After hearing argument, the dependency court noted that it had heard a section 388 petition in July of the previous year; the court found that that there had been no change in circumstances since that time. The court further stated that even if the issues Mother tried to raise had been raised in the original section 388 petition, they would not have mattered, because J.T. had been raised for essentially all of his life by Annette T., whom he knew as his mother. After all of that time, it was not in J.T.'s best interest to switch his parental relationship. The court found that adoption was the most secure, safe, and stable plan for J.T. It further found that there was no compelling reason not to terminate parental rights, and that any detriment to J.T. from severing the relationship with his half brother would be speculative. The court thereupon found J.T. adoptable and terminated parental rights.

Mother thereafter filed an appeal of the order denying her January 2012 section 388 petition and terminating her parental rights.

DISCUSSION

I. Denial of Section 388 Petition

Under section 388, the dependency court has discretion to modify a previously made order if circumstances have changed such that it would be in the child's best interests to modify the order. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526-527 & fn. 5.) This is a two-part requirement. It is not enough to show merely a change in circumstances; the petition must also show that modification of the order would be in the best interests of the child. (*Id.* at p. 529.) The parent seeking the modification bears the burden of making both showings. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

A. No denial of due process

Mother first argues that the dependency court denied Mother her due process rights when it refused to continue the hearing on the section 388 petition to allow Mother time to secure witnesses for cross-examination. We review the denial of a continuance

for an abuse of discretion, keeping in mind that continuances in dependency proceedings are disfavored. (*In re David H.* (2008) 165 Cal.App.4th 1626, 1635.)

Mother is unable to demonstrate any abuse of discretion. Mother offered no excuse at the hearing, and likewise offers no credible reason on appeal, for why she did not seek to secure or identify witnesses prior to the hearing on her section 388 petition. Mother had filed an essentially identical section 388 petition approximately six months earlier, and at that time she could have sought to call witnesses. Certainly, by the time of her second section 388 petition, she should have been prepared to conduct a hearing with live testimony if that is what she intended.

Mother's argument also fails because the trial court correctly found that there had been no change in circumstances. The witnesses that Mother wanted to call—the caseworker, Annette T., and J.T.—all may have had information relevant to whether it was in J.T.'s best interest to terminate the legal guardianship and return J.T. to Mother's custody, but there is no indication that they would have provided any evidence showing that there actually was a change in circumstances. Since it was clear that Mother could not meet both prongs of a section 388 showing (see *In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 529), a continuance would have accomplished no worthy purpose.

The cases cited by Mother do not assist her cause. In *In re Matthew P.* (1999) 71 Cal.App.4th 841 and *In re Clifton V.* (2001) 93 Cal.App.4th 1400, the appellants identified real disputes regarding the credibility of witness statements. Here, Mother has identified no real dispute—she simply contends that she has a close relationship with J.T. which is not reflected in caseworker reports. In any event, Mother identifies no dispute relevant to whether the requirements of a section 388 petition were met.

California Rules of Court, rule 5.570(h) provides that proof at a section 388 hearing may be made by declaration and other documentary evidence, or by testimony, at the dependency court's discretion. The trial court did not abuse its discretion by declining to order live testimony and by denying Mother's request for a continuance.

B. Mother's section 388 petition was properly denied

Modification of a previously made order is within the dependency court's discretion. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704.) The appellate court will not disturb the dependency court's determination "unless an abuse of discretion is clearly established." (*Ibid.*)

Here, the trial court properly found that there had been no change in circumstances, and that it would not be in J.T.'s best interest to terminate the legal guardianship and return J.T. to Mother's custody. Mother's briefs gloss over the fact that she filed two separate section 388 petitions in relatively short order, and that she appealed from only the second one. It is possible that at the time the first section 388 petition was filed, there had been a change in circumstances. Mother appeared to be more stable than she had previously been, and she was taking good care of J.T.'s younger half brother. But, since it was not appealed, we are not concerned with the denial of the first section 388 petition. The trial court properly found that there was no change in circumstances at the time of the second section 388 petition. The second petition was merely a rehash of the first one. A section 388 petition must be supported by a showing of a significant and genuine change in circumstances. (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615.) Since the circumstances here were unchanged, there was no basis to grant the second section 388 petition.

Even if there had been a change in circumstances, however, the section 388 petition was still severely lacking. Mother was unable to show that terminating the legal guardianship and returning J.T. to Mother's custody was in J.T.'s best interest. Mother disappeared from J.T.'s life for more than five years. Annette T. raised him from shortly after his birth, and he thrived in her care. "The reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it." (*In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038.) Annette T. consistently showed that she was willing and able to give J.T. the nurturing he required. J.T. considered Annette T. to be his mother. Uprooting J.T. in January 2012, when he was eight years

old and had known only one maternal figure his entire life, clearly would not have been in his best interest.

II. Termination of Parental Rights

On appeal of an order terminating parental rights, we determine if there is any substantial evidence to support the conclusions of the dependency court. All conflicts are resolved in favor of the prevailing party and all legitimate inferences are drawn to uphold the lower court's ruling. (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732; *In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.) We cannot reweigh the evidence or substitute our judgment for that of the trial court. (*In re Jamie R.* (2001) 90 Cal.App.4th 766, 774.)

At the selection and implementation hearing under section 366.26, subject to certain exceptions, the court must select adoption as the permanent plan and terminate parental rights if it finds that the child is likely to be adopted. (§ 366.26, subd. (c)(1); *In re Celine R.* (2003) 31 Cal.4th 45, 49; *In re Jamie R.*, *supra*, 90 Cal.App.4th at p. 773.) Adoption, when possible, is the permanent plan preferred by the Legislature. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826; *In re Ronell A.* (1995) 44 Cal.App.4th 1352, 1368.) A parent may avoid termination of parental rights by showing that termination would be detrimental to the child. (*In re Celine R.*, *supra*, 31 Cal.4th at p. 53.)

In her appeal, Mother simply argues that the order terminating parental rights must be reversed so that the matter may be remanded for a full rehearing on Mother's section 388 petition. Because we find that the denial of Mother's section 388 petition provides no grounds for remand, there likewise is no basis to reverse the order terminating parental rights.

DISPOSITION

The order denying Mother's section 388 petition and the judgment (order terminating parental rights) are affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.